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No. 85-781

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, AND RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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In our petition, we demonstrated that the court of appeals erroneously decided significant constitutional questions that have a direct bearing on the relationship between the branches of the federal government and on the process by which bills become law. We are rather surprised that respondents, the United States Senate and the Speaker and other members of the House of Representatives, argue so eagerly that these fundamental questions are not worthy of review by this Court and go to such lengths to convince the Court that this dispute about a long-expired bill has not become moot. They advance, however, no substantial reason why the Court should not grant certiorari in this case.

1. As we explained in the petition (at 11-16), this case became moot when H.R. 4042, 98th Cong., 1st Sess. (1983), expired, and the court of appeals clearly erred in refusing to

vacate its judgment on that basis. In their efforts to find some collateral consequence that might keep the case alive, respondents would transform this action from one seeking to vindicate their constitutional role in the legislative process to one " 'merely * * * assert[ing] an abstract interest in bill publication' "(Pet. 11)—precisely the position that they disavowed below. While respondents now contend that the mere refusal to publish H.R. 4042 nullifies the effectiveness of their votes in favor of the bill (J. Br. in Opp. 3; H.R. Br. in Opp. 17-18),[1] they plainly were correct in advancing the opposite position below (Pet. 14 (emphasis in petition; footnote omitted)): " '[v]indication of the effectiveness of [respondents'] votes require[d] a ruling that the law take effect when, by its own terms, its *substantive legal consequences* come into play.' "

Petitioners' refusal to publish H.R. 4042 as the dead letter that it now undeniably is has no effect whatsoever on respondents' lawmaking powers. The bill publication and preservation statutes do not "implement the constitutional design for the legislative process," as respondents baldly assert (J. Br. in Opp. 4). To the contrary, the Constitution nowhere requires that a bill be published in the Statutes at Large in order to have the force and effect of law. Thus, whether or not H.R. 4042 was or ever is published has nothing to do with its legal status. If the President was constitutionally required to exercise a return veto, then the bill became law on the tenth day (Sundays excepted) following its presentment, notwithstanding petitioners' failure to publish it. By the same token, if no return veto was required, the bill was not a law, and it would not have been one even if

[1] "J. Br. in Opp." refers to the joint brief filed by Michael D. Barnes, et al., and the United States Senate. "H.R. Br. in Opp." refers to the brief filed by the Speaker and Bipartisan Leadership Group of the House of Representatives.

petitioners had published it. And either way, H.R. 4042 does not now and never will have any legal effect.[2]

At bottom, all that respondents now seek is, as they admit (J. Br. in Opp. 10), an acknowledgement that "they have enacted a law." Their desire for such an opinion, merely "advising what the law would be upon a hypothetical state of facts" (*Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) (citation omitted)), however, is utterly insufficient to establish a continuing concrete and substantial controversy within the meaning of Article III. As we explained in our petition (at 15 n.13), the Court decided in *National Organization for Women, Inc. (NOW)* v. *Idaho*, 459 U.S. 809 (1982), that a State's attempt to require the government to publish an announcement that the State had rescinded its ratification of the Equal Rights Amendment became moot when the ratification period expired. That decision is equally applicable here, and it compels the conclusion that this case is no longer live and justiciable.[3]

[2] For these reasons, respondents err in contending (H.R. Br. in Opp. 17) that the mootness issue "is merely a variant on" the standing question. Our point is that even if respondents did have standing to sue in federal court to vindicate their "constitutional role[] in the legislative process" (J. Br. in Opp 3), the publication of H.R. 4042 pursuant to 1 U.S.C. (Supp. II) 112 could not now provide that vindication.

[3] Respondents attempt (J. Br. in Opp. 13 n.10; H.R. Br. in Opp. 17 n.20) to distinguish *NOW* on the wholly insubstantial basis that Idaho there sought an acknowledgement that it voted against a failed measure, while respondents here seek recognition that they voted in favor of a successful measure. This distinction might have made a difference if H.R. 4042 were still capable of being put into effect. As it stands, however, the bill can enjoy no greater legal status than could the unsuccessful constitutional amendment at issue in *NOW*. The only question in both cases is whether formal publication by the responsible government officials of the position taken by a party is sufficient, in the absence of continuing legal consequences, to keep a case alive. *Coleman* v. *Miller*, 307 U.S. 433 (1939), on which respondents rely (J. Br. in Opp. 12-13 n.10), is not to the contrary. There, the constitutional amendment in issue was still pending before the states (see 307 U.S. at 451-454), and whether Kansas had ratified it therefore was of continuing importance.

By arguing that the case is not moot, respondents ask this Court "to close [its] eyes to reality." *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion). The reality is that this action concerned whether H.R. 4042 had become a law of the United States, and the answer to that question simply does not matter any more.[4] The case is moot.

2. a. Representative Barnes, et al., and the Senate contend (J. Br. in Opp. 2-7) that respondents' standing in this case rests on 1 U.S.C. (Supp. II) 112, the statute requiring the Archivist of the United States to publish enacted laws in the Statutes at Large. They are, respondents contend (J. Br. in Opp. 6), the "explicit beneficiaries of the requirement that enacted laws be published, [and] are 'within the zone of interests' " protected by the statute. In making this argument, which obviously is contrived in an effort to avoid mootness, respondents for the most part effectively abandon the court of appeals' analysis of standing. That analysis rested on the court of appeals' acceptance of respondents' claim that they suffered "a specific and concrete harm to [their] powers under Article I, section 7" of the Constitution (Pet. App. 15a). The court of appeals never addressed respondents' standing to enforce the statutory publication requirement; and as we explained in our petition (at 14 n.12), if that had been the basis for respondents' standing there would have been no occasion to address whether the Constitution, by establishing the procedure for enacting laws, confers standing on them.

[4]Respondents' own reasoning makes this clear. They state that publication is important so that "any party may take notice of [the statute] and * * * initiate legal action, if necessary, to secure its benefits" (J. Br. in Opp. 6 n.4). Where, however, the statute has expired before even being published, leaving behind no vested rights (as is indisputably true of H.R. 4042), notice serves no purpose because no benefits are available and no one need alter his conduct in any manner.

Respondents' contention that they suffer a distinct injury giving them standing to enforce Section 112 does not withstand even cursory analysis. As we have just explained, failure to publish a bill does not nullify the effectiveness of respondents' votes, because a bill is just as much a law whether it is published in the Statutes at Large or not. Respondents argue (J. Br. in Opp. 6) that the publication statutes were enacted for their special benefit, relying on an act passed by the First Congress entitling each member of Congress to a printed copy of each bill that becomes law. Respondents neglect to point out, however, that this "obsolete" and "archaic" entitlement was repealed more than 30 years ago. S. Rep. 1714, 82d Cong., 2d Sess. 1, 2 (1952); Act of July 10, 1952, ch. 632, §§ 2, 7, 66 Stat. 540, 541. Moreover, if all that respondents seek is a copy of H.R. 4042, they can easily obtain one. They have not, however, been deprived of anything printed in the Statutes at Large. Respondents' contention that H.R. 4042 should have been published in the Statutes at Large, then, is based ultimately on the identical "generalized interest" (*Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974)) that all citizens have in the availability of a convenient record of the laws of the United States. Nothing in the statutes on which respondents rely grants them a distinct, enforceable proprietary interest in the laws that they have passed.

b. The Speaker and Bipartisan Leadership of the House argue (H.R. Br. in Opp. 13-17) that this case is an inappropriate one in which to address the standing of Congress under Article I, Section 7 of the Constitution because the issue was not adequately considered below. The issue, however, was fully briefed by the parties on rehearing, the appropriate time for it to be considered in light of the fact that all of the respondents had standing under binding circuit precedent (see Pet. App. 9a). Moreover, the question was exhaustively considered by both the majority and

dissenting judges in the court of appeals, and it has been the subject of a long line of cases within the circuit (see Pet. 17 n.16; Pet. App. 8a-18a, 47a-118a). In these circumstances, the issue is in an appropriate posture for review by this Court.

Respondents also contend (H.R. Br. in Opp. 16-17) that review is unwarranted because this case does not involve the more common situation of an individual member of Congress suing without the support of the Houses themselves. Plainly, however, the presence of the United States Senate and the Speaker and Bipartisan Leadership Group of the House of Representatives as intervenors only increases the importance of the action and the need for this Court's review.[5]

3. Finally, respondents contend (J. Br. in Opp. 14-20; H.R. Br. in Opp. 9-13) that the court of appeals' holding that the Pocket Veto Clause did not apply to the nine-week intersession adjournment in this case is compelled by this Court's decision in *Wright* v. *United States,* 302 U.S. 583

[5]Respondents also snipe at various parts of Judge Bork's dissenting opinion, including portions that are not germane to the standing argument that we made in the petition (see, *e.g.*, J. Br. in Opp. 9-10; H.R. Br. in Opp. 15-16). Although it is unnecessary here to explore the standing issue at length, we note that respondents do not address the argument made in our petition (at 20-22) that this action is indistinguishable from one seeking the enforcement of H.R. 4042 and that their extensive reliance (*e.g.*, J. Br. in Opp. 9; H.R. Br. in Opp. 13, 14) on *Coleman* v. *Miller, supra,* is misplaced. There, a closely divided Court held that it had jurisdiction to review the decision of a state court that, unconstrained by Article III, had decided federal constitutional questions in an action brought by state legislators. The Court concluded (307 U.S. at 446) that the interest of the legislators, which was "treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." The case does not stand for the proposition that legislators have standing to bring an action in federal court on the basis of an asserted injury to their lawmaking functions.

(1938). Their argument that *Wright* settles the matter is without substance: the Court there ruled in favor of the government's contention that the President had effectively *returned* a veto message to the Senate. The decision cannot reasonably be read as a definitive limitation on the President's authority under the Pocket Veto Clause.

In fact, this Court has never held a pocket veto ineffective. To the contrary, in the only case where it actually decided the issue, *The Pocket Veto Case,* 279 U.S. 655 (1929), the Court concluded that a bill had not become law on the basis of the Pocket Veto Clause.[6] We demonstrated in our petition (at 22-25) that the court of appeals' decision conflicts with the rule established by this Court in *The Pocket Veto Case.* Even if the question is an open one, however, it surely warrants final resolution by this Court rather than by the court of appeals. We do not understand why respondents, as members of a coordinate branch of government, would argue otherwise.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. As suggested in the petition, the Court may wish to consider summarily vacating the decision below and remanding with directions to dismiss the action as moot.

Respectfully submitted.

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Solicitor General

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[6]Respondents' argument (H.R. Br. in Opp. 10) that *Wright* overruled *The Pocket Veto Case* is plainly wrong for the reasons stated in our petition (at 26-27).